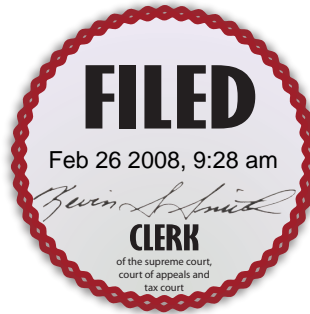


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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A.W.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0707-CR-416
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Mark D. Stoner, Judge  
Cause No. 49G06-0611-FB-221688

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**February 26, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

A.W. appeals from the trial court's denial of his motion to dismiss for lack of subject matter jurisdiction. He presents a single issue for our review, namely, whether the trial court erred when it found that it had jurisdiction over this case.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

On November 17, 2006, A.W. and another young man approached Justin Babcock and ordered him to give them all of his money. A.W. was sixteen years old at the time. Babcock did not have any money on him, so A.W. and his accomplice, one of whom was armed with what looked like a handgun, ordered Babcock to drive them to a nearby bank. While they waited for the ATM at that bank to become available, one of the men held the gun to Babcock's head. After Babcock got money out of the ATM, he gave the money to the two men, and they drove away in his car.

On November 18, police arrested A.W. and B.E., and police found a small silver handgun, later determined to be a BB gun, lying in the grass. Babcock subsequently identified A.W. as one of the perpetrators, but he was not able to identify the second man who robbed him. The State charged A.W. with Robbery, two counts of Attempted Robbery, and two counts of Criminal Confinement.

The information charged A.W. with committing the offenses while armed with a deadly weapon, namely, a handgun. Accordingly, the trial court obtained direct jurisdiction over the case under Indiana Code Section 31-30-1-4, which provides in relevant part that the juvenile court does not have jurisdiction over a juvenile at least

sixteen years of age who commits robbery while armed with a deadly weapon. The State subsequently amended the information to substitute “BB gun” for “handgun.”

A.W. moved to dismiss the charges alleging that the trial court did not have subject matter jurisdiction over the case after the State amended the information. The State argued that the trial court retained jurisdiction because the BB gun constituted a deadly weapon under the circumstances of this case. The trial court denied A.W.’s motion to dismiss. Following a bench trial, the trial court entered judgment of conviction on three counts: robbery, attempted robbery, and criminal confinement. The trial court sentenced A.W. to an aggregate eight-year sentence. This appeal ensued.

### **DISCUSSION AND DECISION**

A.W. alleges that only the juvenile court had jurisdiction to determine whether the BB gun constituted a deadly weapon under the circumstances of this case. Therefore, A.W. contends, the trial court lacked subject matter jurisdiction and its judgment is void as a matter of law. We cannot agree.

When jurisdictional facts are not in dispute, the question of whether a lower court had jurisdiction is reviewed de novo. Phares v. State, 796 N.E.2d 305, 306-07 (Ind. Ct. App. 2003). That is, no deference is afforded the trial court’s conclusion because appellate courts independently, and without the slightest deference to the trial court’s determinations, evaluate those issues they deem to be questions of law. Id. at 307.

Indiana Code Section 31-30-1-4 provides in relevant part:

(a) The juvenile court does not have jurisdiction over an individual for an alleged violation of:

\* \* \*

(6) [I.C. §] 35-42-5-1 (robbery) if:

- (A) the robbery was committed while armed with a deadly weapon;  
or
- (B) the robbery results in bodily injury or serious bodily injury;

if the individual was at least sixteen (16) years of age at the time of the alleged violation.

(c) Once an individual described in subsection (a) or (b) has been charged with any crime listed in subsection (a) or (b), the court having adult criminal jurisdiction shall retain jurisdiction over the case even if the individual pleads guilty to or is convicted of a lesser included offense. A plea of guilty to or a conviction of a lesser included offense does not vest jurisdiction in the juvenile court.

Because the State originally charged A.W. with using a deadly weapon, namely, a handgun, the trial court obtained jurisdiction over the case. A.W. contends that the amended information, substituting “BB” gun for “handgun,” gave the juvenile court jurisdiction over the case. But the amended information still alleged that A.W. committed the offenses while “armed with a deadly weapon.” Appellant’s App. at 27. The substitution of “BB gun” for “handgun” did not change the language in the information alleging the use of a deadly weapon. As such, the trial court properly retained jurisdiction after the amendment.

Further, under the statute, the trial court retains jurisdiction “even if the individual pleads guilty to or is convicted of a lesser included offense.” While neither of those conditions was met here, we hold that it was appropriate for the trial court to rule on the issue of jurisdiction under the circumstances. A.W. makes no contention that the BB gun was not used as a deadly weapon. Indeed, A.W. concedes that this court has held that a BB gun constitutes a deadly weapon under certain circumstances. See e.g., Merriweather

v. State, 778 N.E.2d 449 (Ind. Ct. App. 2002); Hart v. State, 671 N.E.2d 420 (Ind. Ct. App. 1996). And the circumstances of this case support a determination that the BB gun was used in a manner consistent with a deadly weapon. See Merriweather, 778 N.E.2d at 458 (holding evidence showed BB gun had the apparent ability to cause serious bodily injury and was used in a threatening manner where victims testified defendant pointed what appeared to be firearm at them during robbery).

In sum, the amended information alleged use of a deadly weapon. By statute, then, the trial court retained jurisdiction even after the amendment. Regardless, we are not persuaded that the juvenile court was the only appropriate court to consider the question of whether the BB gun constituted a deadly weapon under the circumstances.

Affirmed.

BAILEY, J., and CRONE, J., concur.